IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5592 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAMABHAI BHAGAJI

Versus

BHUPATBHAI R VAGHELA

Appearance:

MR GM AMIN for Petitioners

MR BG PATEL for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 22/09/2000

ORAL JUDGEMENT

The petitioners abovenamed have preferred this petition under Article 227 of the Constitution of India, challenging the judgment and order passed in Review

Application No.TEN.B.A.32/89 the learned Gujarat Revenue Tribunal, Ahmedabad on 14.2.1991 dismissing the said Review Petition of the petitioners. The facts and circumstances leading to this petition may be briefly stated as follows:

2. As per the case of the petitioners, their predecessor deceased Bhagaji Gabaji Vaghela filed a Tenancy Case in the court of Mamlatdar & ALT for declaring him to be a tenant of the disputed land bearing survey no.2254/3 admeasuring 1 Acre 14 Gunthas at village Chaklasi. There the Mamlatdar did not declare him as the tenant and thus decided the matter against the said applicant by judgment and order dated 20.6.1984, A copy thereof is placed at Annexure 'A' to this petition at page 10. Against the said judgment and order at Annexure 'A', the predecessor of the present petitioners preferred appeal before the Dy.Collector. Kheda bearing Appeal No.6575/84 which was decided on 24.9.1984 in which the appeal was allowed and the appellant Bhagaji Gabaji was declared as tenant in respect of the said land. The said order is placed at Annexure 'B' to the petition. Being aggrieved by the said judgment and order of the Dy.Collector, the predecessor-in-title of the present respondents preferred Revision Application before the Gujarat Revenue Tribunal bearing No.1168/85. The learned Tribunal, by judgment and order dated 24.2.1989, allowed the said Revision Application and set aside the aforesaid order of the Dy.Collector. The said judgment has been placed at Annexure 'C' to the petition. The petitioners filed a Review Application which was also decided against the petitioners. The said judgment and order passed in Review Petition on 14.2.1991 has been placed at Annexure 'D' to the petition. The petitioners claim that the aforesaid orders are illegal, erroneous and deserve to be set aside. The petitioners have contended that the the said authorities have wrongly treated the deceased predecessor of the petitioners as member of the family. That they have also erred in holding that the deceased was not a tenant in respect of the said property. That the said authorities have overlooked the position that the deceased was cultivating the said land as tenant thereof. That he was mortgagee in possession as back as in 1945. But he could not be treated to be a member of the family and there was no material to show that he was cultivating the land as a member of the family. That the deceased was in possession prior to the date of mortgage and, therefore, he was not holding possession only as mortgagee-in-possession. That therefore, it cannot be said that since he was mortgagee in possession, he could not be treated as tenant of the said property. That the

aforesaid aspects have not been properly appreciated by the aforesaid authorities and, therefore, the judgment and order of the tribunal are illegal and erroneous and deserve to be set aside. The petitioners have, therefore, prayed for appropriate writ, order or direction directing to quash and set aside the judgments and orders passed by the Revenue Tribunal in Revision Application as well as in Review Application and to restore the judgment and order passed by the Dy.Collector, Kheda in Tenancy Appeal no. 6573/84.

3. On receiving the petition, rule was issued and service was effected on all the respondents. I have heard the learned Advocates for the parties and have perused the papers. The facts are not very much in dispute. The predecessor of petitioners, deceased Bhagaji Gabaji Vaghela had filed Tenancy Case before Mamlatdar & ALT for deciding that he is a tenant of the disputed land bearing survey no. 2254/3 situated at Village Chaklasi. There he did not succeed and therefore, he filed appeal before the Dy.Collector, Kheda. There the appeal was allowed. Being aggrieved by the said order, the predecessors of the present respondents filed Revision Application before the Gujarat Revenue Tribunal. The learned Tribunal allowed the revision application and set aside the order of the Dy.Collector and it was recorded that the petitioners are not tenants of the aforesaid land. Learned Advocate for the petitioners has argued at length that the said authority has committed illegality in holding that the deceased predecessor-in-title of the petitioners was not a tenant in respect of the aforesaid land. On going through the records including the judgment of the Revenue Tribunal in Revision as well as the review petition, it can be gathered that one of the obstacles in the way of the petitioners is that they have consistently held that the deceased predecessor-in-title of the petitioners was a member of the family and, therefore, he could not be treated to be a tenant. It is true that a member of the family cultivating land as such cannot be treated to be a tenant for any purpose. This can be gathered from section 4 of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short, 'the Act'). Section 4 of the said Act is reproduced for ready reference hereunder:

> "4. A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not,
> (a) a member of the owner's family; or ..."

4. From the bare reading of section 4, it becomes clear that members of the owner's family cannot be treated to be tenants. The parties are not at dispute with respect to this proposition of law. A question would arise as to whether the deceased can be treated to be a member of the family and whether he was cultivating the land in dispute in the said capacity. For this purpose, it would be appropriate to consider the pedigree showing the relationship between the parties. This has been produced for perusal by the learned Advocate for the petitioners and it has not been disputed by the learned Advocate for the respondents. It may be reproduced as follows:

Ranchhodbhai

Gokalbhai Gabaji

Dhuvabhai Dahiben Desaibhai Bhagaji

Fulaji Jamabhai

Bhupatbhai Fataji

The above pedigree makes it clear that though the parties are having blood relations, their relations are at distance and they are not closely related to one another. On this aspect of the case, learned Advocate for the respondent has heavily relied upon a decision of this court recorded in the case of Smt.Amthibhai v. Shankerbhai (1983 (1) GLR 170. In para 3 of the judgment, the learned Single Judge of this Court considered the aspect of section 4 of the said Act and found that since the respondent is related by marriage, he must be held to be a member of the family and, therefore, beyond the purview of the benefit of deemed tenancy prescribed under section 4 of the Act. Here the facts are little different. It is to be seen that the parties are not close relatives. Their relationship is at a considerable distance. Another aspect of the case is that there appears to be a subsequent transaction of mortgage between the two. Had there been a family, and if the parties to the mortgage documents were members of

that family, then there was no necessity to enter into a transaction of mortgage. This shows that they were not members of the family and that the deceased was not cultivating the land as member of the family. Again, had the land been cultivated by the deceased as member of the family, then also there was no necessity for him to enter into a contract of mortgage. Moreover, there is no other material to show that the deceased was cultivating the said land as a member of the family. The aforesaid aspects clearly show that the Revenue authorities have ignored this aspect of the case while holding that the deceased was a member of the family and, therefore, he could not be treated to be a tenant within the meaning of section 4 of the said Act. Another aspect of the case is that it is the contention of the learned Advocate for the respondents that the deceased was holding the land as mortgagee-in-possession and, therefore, he could not be treated to be a tenant. There is no dispute that a mortgagee-in-possession cannot technically be treated to be a tenant under the provisions of the said Act. The fact is that the deceased came to be in possession of the land in question before 1945 and the mortgage deed was executed on 15.5.1945. Therefore, it cannot be said that the deceased came to be in possession of this land by virtue of mortgage deed. It therefore, cannot be said that the deceased came to be in possession of the said land only as mortgagee-in-possession and it cannot be said that since he was mortgagee-in-possession, he could not be treated to be a tenant of the said land.

5. We may refer to a recent decision of this court in the case of B.K.Patel (Decd.) Through his Heirs Ranchhodbhai B Patel v. Ichchhaben 1997 (1) GLR 533. In that case, the learned Single Judge of this Court was required to consider the issue of tenancy in accordance with section 2(18) and section 4 of the said Act. The learned Judge has observed that for the purpose of these two provisions, the father-in-law of one's daughter or son cannot be said to be a member of the owner's family so as to defeat the claim of a tenant. The detailed observations are reproduced as under:

> "In a deemed tenancy, a member of owner's family is excluded from the deeming fiction of a tenant. Thus, a member of owner's family cannot be said to be a deemed tenant even if he is lawfully cultivating the land belonging to the owner.
>
> The word 'family' not having been statutorily defined or prescribed in the Act, a general meaning of the word in the context of cultivation

> of land could be taken into consideration. Family relations do nota come to an end for general purpose of blood relations by partition or separation which severs legal status of a joint family. Liberal meaning of the word 'member of family' is required to be given and it can only be said that 'family' means group of people related by blood and/or marriage. So, in the case of marriage of a son with the daughter-in-law, obviously, the son-in-law, on marriage, would become a member of the family and vice versa for the purpose of the Act. However, relationship arising out of marriage cannot be stretched to the father-in-law of the daughter or for that purpose of a son also. It is nobody's case that in the present case, deceased Bhaijibhai was staying with the owner of the land Pasiben or that he was depending on her."

Therefore, it is clear that the fact as to whether or not a person is a member of the family of the owner and as to whether he is cultivating the land as a member of the family of the owner is the question of fact and is required to be decided as a question of fact only. In the present case, it is found that the person in possession of the land and the original owner were not residing together. They did not form one family. They were having a distant relationship. There is no evidence of common income, common expenditure, common residence, common estate, common or joint property between them. Then there was transaction of mortgage between the two. These facts, if taken into account collectively, would lead us to infer that they were not members of the family and the deceased was not cultivating the land as a member of the family of the owner. In that view of the matter, the aforesaid decision makes it clear that it cannot be said that the deceased was cultivating the land in question as member of the family of the owner.

6. In another decision dated 7.7.1993 recorded by this court (Coram :D.G Karia, J (as He then was) in Special Civil Application no.5486/85 in the case of Valand Mafatbhai Kashibhai v. Valand Vithalbhai Motibhai, this court was required to consider the question of interpretation of family. There the observation was that the tribunal had come to a conclusion that the petitioners were cousin brothers of respondent Vithalbhai. However, on perusal of the record, it is found that Vithalbhai is not shown to be the owner of the said land. One Chanchalben was shown to be the owner of the land. Chanchalben had married and

therefore, it has been observed that she cannot be continued to be a member of the family of Shanabhai Amthabhai. The learned Judge has considered the dictionary meaning of the term 'family' and has observed that the family is a group of people related by blood or marriage. On applying the said ratio in the case of Amthabhai, the learned Judge has observed that Chanchalben cannot be said to be a member of the family of Shanabhai Amthabhai as a result of her marriage. Then the learned Judge has also considered the definition of family found in section 2(F) of the Urban Land (Ceiling and Regulation) Act, 1978. However, that definition was required to be restricted to the operation of that law and it cannot be projected in the Bombay Tenancy and Agricultural Lands Act. and, therefore, that observations will not be useful for deciding this matter. Considering the facts and circumstances of the case, it is very clear that the deceased cannot be treated to be a member of the family of the owner and that it cannot be said that he was cultivating the land as a member of the family of the owner. It has been contended that since the deceased was mortgagee-in-possession, he could not be treated to be a tenant. It is a fact that the deceased was cultivating the land before 15.5.1945 and the deed of mortgage was executed only on 15.5.1945 and, therefore, his possession was prior to the deed of mortgage. It, therefore, cannot be said that he was in possession of the said land only by virtue of execution of the mortgage deed. Therefore, it could not be said that he was in possession only on the strength of mortgage. In other words, it cannot be said that he was a mortgagee -in-possession and, therefore, he could not be treated to be a tenant.

7. Another decision on which reliance was placed in the case of Mohd Yunus v Mohd. Mustaqim (AIR 1984 SC 38 wherein it has been laid down that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority" and not to correct an error apparent on the face of the record, much less an error of law. This principle cannot be disputed but the facts remain that the predecessor-in-title of the petitioners was in possession of the land in question even before 1945 and if this possession is disturbed on certain erroneous and illegal interpretation, then there would be substantial injustice to the petitioners. In that view of the matter, in order to give substantial

justice, it is necessary for this court to exercise extraordinary jurisdiction under Article 227 of the Constitution of India. Therefore, the principles enunciated in the decision of the Apex Court cannot be applied to the facts of this case for exercising extraordinary power and jurisdiction of this Court. Therefore, this decision will not help the case of the respondent to any extent.

8. Learned Advocate for the petitioners has argued that the deceased was the tenant of the land of the owner and that they have not been staying together at any point of time and they were having separate properties. Their income was separate, their transactions were separate and these facts go to show that the deceased was not a member of the family of the owner and he was not in possession of the land in dispute as a member of the family of the owner. On the other hand, he was also not in possession only on account of the fact that he had obtained the land by mortgage with possession. These facts are very much clear. The records do not show that the deceased was a member of the family. On the contrary, the aforesaid arguments were in favor of the petitioners and it is, therefore, clear that when there was good distance in the relations and when the two parties have been possessing separate properties with separate residences, separate income and separate transactions, it cannot be said that the deceased was a member of the family of the owner and, therefore, the learned Tribunal has committed serious error in law in holding that the deceased was a member of the family of the owner and was mortgagee-in-possession and therefore, he could not be treated to be a tenant. It is, therefore, clear that the Tribunal has seriously erred in deciding the matter accordingly. In this view of the matter, this petition is required to be allowed and the aforesaid decision of the Tribunal is required to be quashed and set aside.

9. This petition is accordingly allowed. The judgments and orders recorded by the Tribunal in Revision Application No.TEN.P.A. 168 of 1985 dated 24.2.1989 and in Review Application No.TEN.C.A. 32/89 dated 14.2.1991 are quashed and set aside and the order of the Dy.Collector, Kheda recorded in Appeal No.6573/84 dated 24.9.1984 is hereby restored.

Rule is made absolute to the aforesaid extent. No order as to costs.

[D P Buch, J]

msp.